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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KHUE and
KIM-LIEN NGUYEN.

KHUE NGOC NGUYEN,

Appellant,

v.

KIM-LIEN HOANG NGUYEN,

Respondent.

D053131

(Super. Ct. No. D458947)

APPEAL from an order of the Superior Court of San Diego County, Gonzalo Curiel, Judge. Affirmed.

Khue Ngoc Nguyen (Khue) appeals an order granting the motion of Kim-Lien Hoang Nguyen (Kim) for an award of attorney fees incurred, or to be incurred, in responding to Khue's appeal of the trial court's order granting her motion to set aside the 2000 judgment dissolving their marriage and dividing their community property. On

appeal, Khue contends the trial court abused its discretion in awarding Kim attorney fees and in determining the amount of fees awarded.¹

FACTUAL AND PROCEDURAL BACKGROUND²

In 1986 Khue and Kim were married. In 2000 Khue filed a petition for dissolution of their marriage. In September 2000, the trial court entered a judgment dissolving Khue and Kim's marriage and awarding a San Diego property to Khue and a Temecula property to Kim.

In October 2006, Kim filed a motion to set aside the 2000 judgment's property division and spousal support portions on the grounds of Khue's perjury and fraud. (Fam. Code, § 2122, subds. (a), (b).)³ (*Nguyen I, supra*, at pp. 4-5.) Her motion also requested an award of attorney fees and costs. In October 2007, the trial court issued an order granting in part Kim's motion to set aside the judgment. (*Id.* at p. 5.) On December 23, 2008, we affirmed that order on appeal. (*Id.* at p. 17.)

On November 27, 2007, Khue filed an income and expense declaration in which he stated the fair market value of real and personal property he owned, less debts owed, was \$550,000. He also stated he obtained a \$150,000 loan from Linda Hoang. In his

¹ Kim has not filed a respondent's brief in this appeal.

² In presenting the factual and procedural background in this case, we rely in part on the factual and procedural background set forth in our opinion in *In re Marriage of Nguyen* (Dec. 23, 2008, D051966) [nonpub. opn.] (*Nguyen I*), which we incorporate by reference. In *Nguyen I*, we affirmed the trial court's order granting in part Kim's motion to set aside the 2000 judgment. For a more complete background, refer to *Nguyen I*.

³ All statutory references are to the Family Code unless otherwise specified.

2006 federal income tax return attached to his declaration, he stated he received \$79,600 in gross rental income in 2006 but, after deduction of expenses, received only \$2,124 in net rental income.

On January 16, 2008, Khue filed a declaration in opposition to Kim's motion for appellate attorney fees, in which he stated Kim's income and expense declarations showed she was employed and earned at least \$3,000 per month.⁴ Although he has a real estate license, Khue claimed he had not been able to make a living in the real estate business. He stated: "[T]o retain an attorney, pay for my living expenses and to maintain my property, I had to secure a loan from Linda Hoang, a friend of both myself and [Kim]. I borrowed \$150,000 from Ms. Hoang." He asserted Kim "should not be awarded attorney's fees, as she has shown no need for an award and I do not have the ability to pay an award of attorney's fees or costs." He further asserted: "I have absolutely no assets, liquid or otherwise, that would allow me to pay for any of [Kim's] attorney's fees or costs."

On March 7, 2008, Kim filed an income and expense declaration in which she stated she was employed and, on average, earned \$3,154 per month in salary, \$89 in overtime, and \$276 in bonuses. She stated her total expenses were, on average, \$4,674

⁴ The record on appeal does not include a copy of Kim's motion for attorney fees incurred in responding to Khue's appeal of the order granting her motion to set aside the judgment. Nevertheless, based on Khue's representation and the trial court's subsequent hearing of and ruling on that motion, we presume for purposes of this appeal that Kim properly moved for an award of appellate attorney fees, whether separately or as part of her original motion to set aside the judgment.

per month. Although Kim had \$1,400 in cash and deposit accounts and \$8,000 in personal property, the total amount of her credit card and loan balances (over \$30,000) exceeded the amount of those assets.

On March 18, 2008, the trial court heard oral arguments of the parties and granted Kim's motion, awarding her \$6,000 in appellate attorney fees.⁵ On May 27, the court issued a written order awarding Kim \$6,000 for attorney fees and costs incurred on appeal, payable to her attorney (Montgomery) in installments of \$400 per month. Khue timely filed a notice of appeal challenging that order.⁶

DISCUSSION

I

Attorney Fee Awards under Sections 2030 and 2032 Generally

In a marital dissolution proceeding or any proceeding subsequent to entry of a related judgment, a trial court may order payment of attorney fees and costs between the parties based on their "respective incomes and needs" and "respective abilities to pay," to "ensure that each party has access to legal representation to preserve each party's rights."

⁵ Prior thereto (on February 13), the trial court granted Kim's motion for attorney fees in maintaining her motion to set aside the judgment and awarded her \$7,500 for nonappellate attorney fees and costs. In a separate opinion filed on the same date herewith, we affirmed that order on appeal. (*In re Marriage of Nguyen* (Feb. 25, 2009, D052712) [nonpub. opn.] (*Nguyen II*).)

⁶ Although Khue's notice of appeal was filed on May 15, 2008, and expressly appeals the trial court's findings and order after the March 18 hearing, we exercise our discretion to deem this appeal to be from the court's May 27 written order issued after that March 18 hearing.

(§ 2030, subd. (a); *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 829.) The amount of an award shall be "whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." (§ 2030, subd. (a)(1).) "The purpose of such an award is to provide one of the parties, if necessary, with an amount adequate to properly litigate the controversy. [Citations.]" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629.) Section 2030, subdivision (a)(2), provides: "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay."

A court may award attorney fees under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) Section 2032, subdivision (b), provides: "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the

litigation equitably between the parties under their relative circumstances." Furthermore, "[t]he court may order payment of an award of attorney's fees and costs from any type of property, whether community or separate, principal or income." (§ 2032, subd. (c).) "The parties' 'circumstances' as described in section 4320 include assets, debts and earning ability of both parties, ability to pay, duration of the marriage, and the age and health of the parties." (*In re Marriage of Duncan, supra*, 90 Cal.App.4th at p. 630, fn. omitted.) Furthermore, "[i]n assessing one party's relative 'need' and the other party's ability to pay, the court may consider all evidence concerning the parties' current incomes, *assets*, and abilities, *including investment and income-producing properties*. [Citation.]" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167, italics added.)

Pursuant to sections 2030 and 2032, a party may be awarded, either pendente lite or on completion of the proceedings, attorney fees and costs incurred, or to be incurred, on appeal in a martial dissolution and property division case. (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 27, 29 [regarding former Civ. Code, § 4370]; Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 14:9, pp. 14-3 to 14-4, ¶¶ 16:420 to 16:421, p. 16-117; see also § 2030, subd. (c) ["The court shall augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded."].)

"[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] '[T]he trial court's

order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' [Citation.]" (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.) Furthermore, "the record must reflect that the trial court actually exercised that discretion, and considered the statutory factors in exercising that discretion. [Citations.]" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827, fn. omitted.)

II

Award of Attorney Fees

Khue contends the trial court abused its discretion by awarding Kim appellate attorney fees and costs incurred, or to be incurred, in responding to his appeal of the order granting her motion to set aside the 2000 judgment.

A

At the March 18, 2008, hearing, Kim's counsel stated Kim had to borrow money to pay attorney fees to respond to Khue's appeal of the court's October 2007 order granting her motion to set aside the judgment. Her counsel argued that while Kim had no money, Khue had all of the real property, including rental properties from which he received all of the rental income. Her counsel represented that Kim had to borrow \$6,000 to pay an appellate attorney (Judith Klein) to represent her on appeal. Khue's counsel argued that Khue was "in a financial bind right now. There was an award of \$7,500 in attorneys' fees."

The trial court replied: "Well, [Khue's] not in such a bind where he's not exercising his rights to take appeals on all the matters that are being decided and expending additional attorneys' fees on these matters" The court stated:

"As to the . . . motion on attorney fees and costs on appeal, the court at this time will consider that matter under [section] 2032 of the Family Code. The court does find that the request is just and reasonable under the relative circumstances. The court takes into account the underlying orders that involve fraud on the part of [Khue] and ultimately the need of [Kim] to obtain counsel in order to initially obtain a -- set aside a default [judgment] and ultimately at this point attorney fees on appeal in order to protect the order that has been entered by this court in setting aside the default [judgment].

"The court, as to the matter of the other attorney fee award, does find that [Khue] has available assets that he can tap in order to provide [Kim] with attorney fees. The court finds further that [Kim] does not have the financial resources to pay attorney fees on appeal and that the award of attorney fees is just and proper under all of the circumstances presented to the court."

The court then confirmed it was awarding Kim \$6,000 for attorney fees on appeal.

In its written order issued on May 27, the trial court made the following findings:

"1. The Court finds that based on Family Code Section 2032 that [Kim's] request is just and reasonable;

"2. The Court finds that [Kim] does not have the financial resources from which to pay attorney's fees; and

"3. The Court finds that [Khue] has available assets from which to contribute toward [Kim's] attorney's fees."

The court then ordered: "[Khue] is to contribute \$6,000.00 toward [Kim's] attorney's fees and costs for the Appeal/Appeals pending in this matter," payable to her attorney (Montgomery) in installments of \$400 per month until paid in full.

B

Khue asserts the trial court abused its discretion by awarding Kim appellate attorney fees and costs based on its erroneous finding that Kim had a greater relative need for an award of attorney fees. Khue argues Kim had greater liquid assets and income than he did. He argues he has been unable to sustain a living in the real estate business. In awarding Kim attorney fees, Khue argues the trial court ignored that evidence of his inability to pay Kim's attorney fees. In particular, he argues that had the court properly considered his income and expense declaration and tax information, it could not have reasonably concluded he had an ability to pay Kim's attorney fees. He also argues the court ignored his obligations to pay \$400 per month in child support and to pay his own attorney fees in defending Kim's motion to set aside the judgment and in appealing the court's order granting that motion.

There is nothing in the record showing the trial court ignored his income, tax information, or obligations to pay child support or his own attorney fees. Rather, the record supports the reasonable inference the trial court implicitly considered that evidence but, on its consideration of that evidence together with other evidence, found Kim had a greater respective need for an attorney fee award and Khue had a greater respective ability to pay her attorney fees. As noted above, Khue's income and expense declaration showed he had equity of \$550,000 in properties he owned. That declaration also showed Khue received gross annual rental income of \$79,600, although, after expenses, he earned net rental income of only \$2,124. It also showed he received \$150,000 in loan proceeds. Based on Khue's much greater net assets (at least \$550,000)

and liquidity (including the proceeds of the \$150,000 loan), the trial court could reasonably conclude Khue had a greater respective ability to pay Kim's attorney fees even though she may have had greater net income.

A trial court should not focus solely on income, but should also consider assets and other financial resources, including investment and income-producing properties, that can be used to pay attorney fees. (§ 2032, subd. (b); *In re Marriage of Duncan, supra*, 90 Cal.App.4th at p. 630; *In re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1167.)

Furthermore, in awarding appellate attorney fees to Kim, the trial court's written order expressly found Kim's request was just and reasonable under section 2032 and she did not have the financial resources from which to pay attorney fees. The court found Khue had "available assets from which to contribute toward [Kim's] attorney's fees."

Therefore, the court implicitly found the amount of equity available to Khue (i.e., at least \$550,000) gave him a greater ability to pay Kim's attorney fees. Based on that record, we conclude the trial court did not abuse its discretion by concluding Khue should pay Kim's attorney fees and costs in responding to his appeal of the order granting her motion to set aside the 2000 judgment. (*In re Marriage of Sullivan, supra*, 37 Cal.3d at pp. 768-769.)

The record reflects the trial court actually exercised its discretion and considered the statutory factors in exercising its discretion to award Kim attorney fees. (*In re Marriage of Braud, supra*, 45 Cal.App.4th at p. 827.)

III

Amount of Attorney Fee Award

Khue contends the trial court abused its discretion in determining \$6,000 as the amount of appellate attorney fees to be awarded to Kim because the court erred in finding he had an ability to pay her attorney fees and costs. He also argues the court did not inquire as to the reasonableness of the amount of fees. He argues the court did not consider the factors set forth in *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, and only made a conclusory finding regarding his ability to pay Kim's attorney fees.

The record supports the reasonable inference that the trial court considered the parties' respective incomes, expenses, and assets in determining Khue's ability to pay Kim's attorney fees. Given Khue's failure to request a statement of decision, we make all implied findings necessary to support the court's order to the extent those findings are not inconsistent with the record. (Cf. *In re Marriage of McQuoid* (1991) 9 Cal.App.4th 1353, 1361.) Accordingly, the court was not required to specifically address each item of the parties' incomes, expenses and assets, or otherwise specifically state how it determined Khue had the greater financial resources or other ability to pay Kim's attorney fees.⁷

⁷ The trial court was not required to expressly address each factor set forth in *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at page 870. Rather, because Khue did not request a statement of decision, we presume the trial court implicitly considered those factors in making its determination regarding the amount of attorney fees it awarded to Kim.

Furthermore, although the trial court did not expressly find \$6,000 was a reasonable amount for appellate attorney fees, the court could rely on its own experience and knowledge in implicitly determining the reasonable value of the services rendered by, or to be rendered by, an appellate attorney (i.e., Judith Klein) in responding to Khue's appeal of the order granting Kim's motion to set aside the judgment. (*In re Marriage of Keech*, *supra*, 75 Cal.App.4th at p. 870; *In re Marriage of McQuoid*, *supra*, 9 Cal.App.4th at p. 1361.) Contrary to Khue's assertion, the court was not required to inquire into the qualifications or experience of Kim's appellate attorney or the attorney's time spent, or to be spent, on the appeal. In any event, given our familiarity with the record and issues in *Nguyen I*, we conclude the trial court did not err by determining \$6,000 was a reasonable amount for the appellate legal services incurred, or to be incurred, by Kim in that appeal.

The record also supports the reasonable inference the trial court actually exercised its discretion in determining the amount of attorney fees to be awarded and considered the relevant factors in determining that amount. (*In re Marriage of Braud*, *supra*, 45 Cal.App.4th at p. 827.) The court expressly referred to section 2032. Given Khue's failure to request a statement of decision, we presume the trial court made all implied findings and considered all appropriate factors to support its order. (Cf. *In re Marriage of McQuoid*, *supra*, 9 Cal.App.4th at p. 1361.) Therefore, the record supports the inference that the court found Khue had the financial resources and ability to pay Kim \$6,000 in attorney fees and that it found \$6,000 was a reasonable amount for appellate attorney fees. The fact the court awarded Kim the entire amount of appellate attorney

fees she requested (i.e., \$6,000) does *not* show the court failed to exercise its discretion to determine the reasonable amount of appellate attorney fees. We conclude the trial court did not abuse its discretion by determining \$6,000 as the amount of appellate attorney fees to be awarded to Kim.

IV

Availability of Khue's Assets to Pay Kim's Attorney Fees

Khue contends the trial court erred by suggesting he could "tap" his available assets (i.e., obtain a loan by encumbering his property) to pay Kim's attorney fees. He concedes the court did not order him to do so.

We conclude the trial court did not err by suggesting Khue had sufficient assets from which he could pay Kim's appellate attorney fees. To the extent he argues section 2032, subdivision (c), does not allow a court to order him to encumber property that had appreciated in value, that statute is inapplicable because, as he concedes, the court did *not order* him to encumber his property.⁸ In any event, Khue does not show that the trial court's purported erroneous "suggestion" was prejudicial error. Given Khue's \$550,000 in equity in his properties and \$150,000 in loan proceeds received from Hoang, the court

⁸ The cases cited by Khue, *In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273 and *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, are inapposite and do not persuade us to conclude otherwise.

could reasonably conclude Khue had the ability to pay \$6,000 for Kim's appellate attorney fees in installments of \$400 per month.⁹

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.

⁹ Although Khue also contends Kim failed to comply with her disclosure obligations by using the term "none" instead of a dollar amount (i.e., \$0) in her income and expense declaration, we consider that contention to be waived on appeal because he does not argue, or show, her purported noncompliance was prejudicial to him (i.e., a different result probably would have occurred had she complied).